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DEPENDENT RELATIVE REVOCATION[1]

SOME years ago I was accustomed to devote four lectures in the Harvard Law School to dependent relative revocation. Once, near the close of the third hour, a student from the rear of a large class asked, "Has this subject anything to do with dependent relatives?" It was some moments before I could regain the men's attention. I have since been wondering whether the joke was on the student, on me, or on Mr. Powell, who in 1788 gave currency to the phrase. It is the object of this paper to place the blame on Mr. Powell.

The expression is found in the books as early as 1788 in the first edition of "Powell on Devises," where the author says (p. 637):

"This principle, that the effect of the obliteration, cancelling, etc., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced another distinction not yet taken notice of; namely, *that* of dependent relative revocations, in which the act of cancelling, etc., being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not."

The expression was repeated in 1832 by Williams,[2] and later by Theobald,[3] by Jarman's English editors,[4] by Woerner,[5] by Page,[6] and in many cases.[7]

[1] I am indebted to my colleague, Prof. Edward H. Warren, for valuable suggestions in regard to this analysis.

[2] 1 WILLIAMS, EXECUTORS, 1 ed., 69. [3] THEOBALD, WILLS, 2 ed., 37.

[4] 1 JARMAN, WILLS, 5 ed., 119. The idea, though without this expression of it, had appeared in the first edition. 1 JARMAN, WILLS, 1 ed., 121, 122 (1843).

[5] 1 WOERNER, AM. LAW ADM., 1 ed., 90, 96; 2 ed., 94, 100.

[6] PAGE, WILLS, §§ 263, 275–277.

[7] Dickinson v. Swatman, 30 L. J. (P. M. & A.) 84 (1860); Goods of M'Cabe, L. R. 3 P. & D. 94 (1873); Goods of Horsford, L. R. 3 P. & D. 211 (1874).

Under this title the text writers have grouped and considered a number of cases more or less closely related. For instance: the testator destroys his will intending to make a new one, but does not, or the new document is invalid when executed; he tears up a revoking will under the impression that he thereby revives his first testament; he crosses out a portion of his will and interlines new matter which, being unsigned and unwitnessed, is of course of no effect; he makes a new will inconsistent with the old, which contains, or does not contain, a revoking clause, and the new will fails from defective execution or from inability of the devisee to take. In some of the books[8] there is also included the case of a second revoking will being set aside because the ground upon which the testator proceeded and which appeared in the will itself has turned out to be false. By other writers[9] this class has been separately treated.

It is believed that this classification is loose and misleading, that the term "dependent relative revocation," while not entirely devoid of inherent sense, tends toward the treatment of different subjects under a single principle, and should be abandoned for more specific and discriminating nomenclature. Revocations ordinarily dealt with thereunder are, properly, either conditional revocations or revocations under a mistake. These two distinct classes may each in turn be considered from the point of view of (*a*) revocation by act to the document; (*b*) revocation in writing. To the consideration of conditional revocation by act to the document we now address ourselves.

I

Conditional Revocation by Act to the Document

Let it be supposed that the testator tears up his will intending the act to be a revocation only upon the happening of a condition. The event anticipated never takes place. Is the will revoked? It is common knowledge that there is no revocation by act unless there is *animus revocandi*. If the testator in cleaning his desk destroys his will by accident, or if he "were to throw ink upon his

[8] 1 Williams, Executors, 10 ed., 112, 113, 127, 128; 1 Woerner, Am. Law Adm., 2 ed., §§ 48, 51; Page, Wills, §§ 275-277.

[9] 1 Jarman, Wills, 5 ed., 147; Theobald, Wills, 7 ed., 746.

will instead of sand," the testament is not affected.[10] Parol testimony of the testator's intent is admissible, for one is not construing a writing, not altering the meaning of a document, but setting in its proper light an act.[11] It would have been a conceivable position for the law to take if it had said that, provided the act was done with *some* intent to revoke, the will would be held annulled, in spite of the testator's desire that the revocation should not be complete until some condition had been performed. If one is dealing with the state of mind of a dead man, it is dangerous to attempt to be too nice as to its condition; and therefore, as a rule of practice, any sort of intent to revoke shall be taken to be absolute. Though that state of the law is conceivable, it is more natural that many of the cases should purport to give full effect to the exact state of the deceased's *animus*. If this is the proper attitude of the law, as may well be, the courts should face the situation frankly, and seek in every case the exact mental condition of the testator at the time of the act.

The English decisions are, however, not wholly satisfactory. Conditional revocation by act is commonly represented in the courts by the case in which the testator tears up his will, intending that act to annul it only when he completes another will; where, in short, it is clear that the deceased did not intend a period of intestacy. Indeed, this is the only example of such a revocation that has been found. One of the earliest cases seems to be *Burtonshaw* v. *Gilbert* (1774).[12] The plaintiff claimed in trespass as heir and the defendant under a will of 1759. This will the testator in 1761

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[10] 1 WILLIAMS, EXECUTORS, 10 ed., 110; 1 WOERNER, AM. LAW ADM., 2 ed., § 48.

[11] 3 WIGMORE, EVIDENCE, § 1782.

It is no part of this article to discuss at length the question of the admission of declarations of the testator as to the intent with which the act was done. Declarations at the time of the act are admissible. 3 WIGMORE, EVIDENCE, § 1782. As to subsequent declarations, see 3 WIGMORE, EVIDENCE, §§ 1736, 1737; 26 HARV. L. REV. 159; 10 AM. & ENG. ANN. CAS. 535, note; 24 L. R. A. (N. S.) 180. In favor of their admission: Burton *v.* Wylde, 261 Ill. 397, 103 N. E. 976 (1914); Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487 (1913); Managle *v.* Parker, 75 N. H. 139, 71 Atl. 637 (1908); *In re* Shelton's Will, 143 N. C. 218, 55 S. E. 705 (1906); Barfield *v.* Carr, 169 N. C. 574, 86 S. E. 498 (1915). Against their admission: Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. Ct. Rep. 474 (1901); *In re* Colbert's Estate, 31 Mont. 461, 78 Pac. 971 (1904); Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442 (1901).

[12] Cowper, 49. See the earlier decisions of Hyde *v.* Hyde, 1 Eq. Cas. Abr. 409, and Hide *v.* Mason, 2 Eq. Cas. Abr. 776 (1734). The latter case seems to have turned on the intent of the testator.

destroyed, and at the same time made a will containing a revocation clause in which the devises varied from those in the former. Later the testator called for the second paper and sent for an attorney to make a third will. He died, however, before executing such a document, and the will of 1761 was found cancelled among his papers. Lord Mansfield found for the heir. The court dealt mainly with the question of the revival of the first will by the cancellation of the second. Lord Mansfield did not discuss the question of conditional revocation of the second will, though he said that the testator's reason for annulling the second was the making of a third. The court assumed without discussion an absolute revocation of the will of 1761. In *Winsor* v. *Pratt* (1821) [13] the court of Common Pleas found no revocation where the testator cancelled parts of his will and inserted interlineations, intending to complete a copy of the amended document, which was drafted but never executed. The judges said it was entirely a question of the actual intent of the deceased, but found that intent on this evidence to be conditional. Certainly, on principle, no presumption of conditional revocation, can arise from the mere fact that at the time of cancelling the first will a second is intended. Yet *Winsor* v. *Pratt* may perhaps be supported on there being sufficient evidence of tentative cancellation only. But in 1828 *Goods of Appelbee*[14] struck a discordant note. The testator caused the signature to his will to be struck through and made an interlineation, stating his intention to execute a copy of the will thus amended. This was never done. The court said,

"The signature of 'A' being struck through, is to be regarded as preparatory to the deceased making a new will — which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation."

The evidence of condition is almost non-existent. There is considerably less of it than in *Winsor* v. *Pratt*, for in *Goods of Appelbee* the testator did much more to the will itself than in the earlier case. In *Winsor* v. *Pratt* the names of the witnesses and the signature of the testator remained intact; only a few clauses were amended. But in the case in the ecclesiastical court the acts to the document were of a distinctly definitive character. It is one thing to disre-

[13] 5 J. B. Moore. 484.

[14] 1 Hagg. Eccl. 143.

gard completely the conditional character of revocation on grounds of practical convenience. It is an entirely different matter to adopt a doctrine which is based on actual intent, and then to lay down a conclusive presumption of condition where none may have existed and where there is certainly no evidence thereof. *Goods of De Bode*[15] (1847) carried this error still further in holding conditional a revocation which was proved merely by showing that the testamentary documents were found cancelled among the papers of the deceased and that the deceased at various times stated his intention of making a new will which was not found. It should be observed that both these cases were non-contentious, and decided on consent of all parties interested. In *Goods of Cockayne*[16] (1856) the will was held not revoked, though mutilated. The decision is sound enough on the evidence of conditional intention. And the same may perhaps be said of *Goods of Eeles*[17] (1862). In 1863 Sir C. Cresswell[18] in effect overruled *Goods of De Bode*. Finally in a litigated case in 1905 Sir Gorell Barnes[19] left it to the jury to say whether the intent of the testator was to revoke absolutely, irrespective of whether a new will was made or not, or whether the revocation was conditional on the making of a new will that was never executed. This is precisely the proper way to deal with the question. And although it is only the decision of a single judge, the ruling must be given greater weight than the earlier *ex parte* decisions.

The law in the United States places the whole doctrine of revocation with a new will in view upon the correct principle. The actual intent of the testator is to be sought in each case.[20]

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[15] 5 Notes of Cases, 189.

[16] Dea. & Swa. 175. See Hyde *v.* Hyde, 1 Eq. Abr. 409; Williams *v.* Tyley, Johns. V. C. 530 (1858); Elms *v.* Elms, 1 Swa. & Tr. 155 (1858); Doe *v.* Perkes, 3 B. & Ald. 489 (1820).

[17] 2 Swa. & Tr. 600.

[18] Goods of Mitcheson, 32 L. J. P. M. (N. S.) 202; and see Goods of Parr, 6 Jur. (N. S.) 56 (1859).

[19] In Dixon *v.* The Solicitor to the Treasury, [1905] P. 42. See Goods of Irvine, 53 Irish L. T. 144 (1919).

[20] Estate of Olmsted, 122 Cal. 224, 54 Pac. 745 (1898); McIntyre *v.* McIntyre, 120 Ga. 67, 71, 47 S. E. 50 (1904) (*semble*); Sanders *v.* Babbitt, 106 Ky. 646, 51 S. W. 163 (1899); Semmes *v.* Semmes, 7 H. & J. (Md.) 388 (1826); *In re* Frothingham's Case, 76 N. J. Eq. 331, 74 Atl. 471 (1909); Johnson *v.* Brailsford, 2 Nott & McC. (S. C.) 272 (1820). See Thomas *v.* Thomas, 129 Iowa, 159, 105 N. W. 403 (1905); Youse *v.* Forman, 5 Bush (Ky.), 337 (1869); Townshend *v.* Howard, 86 Me. 285, 29 Atl. 1077 (1894);

II

Revocation by Act to the Document under a Mistake

If the testator cancels his will by act under the impression that he has made another valid testamentary disposition, it is evident that a revocation has actually occurred. If the court probates the will nevertheless, it must be on the ground that it is setting aside a completed act. Just as title passes to the subject matter of a sale induced by fraud or mistake,[21] so here a legal transaction has taken place and can only be affected through the equitable jurisdiction of the court. The case differs essentially from the destruction by the testator of his will thinking it to be another document, for here no intent to revoke exists; while in the case first supposed there is no question but that the testator intends to revoke his will. He is, however, induced to do so by a misapprehension of law or of fact. It is entirely within the power of the Probate Court to refuse to set aside the revocation. There is no jurisdiction in equity to set aside a will for mistake.[22] Authority for striking words out of a will for error is almost non-existent in the United States.[23] And in England until recently mistake was not a ground for omitting words in the Probate Court.[24] This jurisdiction, however, has been frequently exercised there of late years.[25] Yet in no case has this been done where the mistake was as to the inducement to make the will, or a bequest therein, as distinct from the *factum*, the existence of words in the will.

Safe Deposit & Trust Co. *v.* Thom, 117 Md. 154, 166-169, 83 Atl. 45 (1912); Banks *v.* Banks, 65 Mo. 432 (1877); *In re* Raisbeck, 52 Misc. 279, 102 N. Y. Supp. 967 (1906).

[21] Cox *v.* Prentice, 3 M. & S. 344 (1815).

[22] 26 Harv. L. Rev. 212, 214.

[23] But see O'Connell *v.* Dow, 182 Mass. 541, 544, 66 N. E. 788 (1903); Waite *v.* Frisbee, 45 Minn. 361, 47 N. W. 1069 (1891); Bradford *v.* Blossom, 207 Mo. 177, 105 S. W. 289 (1907); Sherwood *v.* Sherwood, 45 Wis. 357 (1878). Compare Fleming *v.* Morrison, 187 Mass. 120, 72 N. E. 499 (1904); Kennedy's Estate, 159 Mich. 548, 124 N. W. 516 (1910); Nelson *v.* McDonald, 61 Hun (N. Y.), 406, 16 N. Y. Supp. 273 (1891); Alter's Appeal, 67 Pa. 341 (1871); Gifford *v.* Dyer, 2 R. I. 99 (1852).

[24] Stanley *v.* Stanley, 2 J. & H. 491 (1862); Sugden, Law of Property, 196, 197.

[25] Goods of Duane, 2 Swa. & Tr. 590 (1862); Goods of Oswald, L. R. 3 P. & D. 162; Morrell *v.* Morrell, L. R. 7 P. D. 68 (1882); Goods of Gordon, [1892] P. 228; Goods of Moore, [1892] P. 378; Brisco *v.* Baillie Hamilton, [1902] P. 234; Vaughan *v.* Clerk, 87 L. T. (N. S.) 144 (1902). And see Rhodes *v.* Rhodes, 7 A. C. 192, 198 (1882); Goods of Hunt, L. R. 3 P. & D. 250; *In re* Meyer's Estate, [1908] P. 353.

Nevertheless in the case of revocation by act to the document both English and American courts have undertaken to relieve in cases of mistake. Have they done so on correct principles? If the revocation has actually taken place, and it is a question of setting it aside on equitable grounds assumed by the Probate Court, it would clearly not be equitable to restore the revoked will, if the testator, had he been fully informed in the premises, would have preferred the revocation to stand.

One of the earliest cases, and undoubtedly the most celebrated case of dependent relative revocation, is *Onions* v. *Tyrer* (1717).[26] Tyrer made a will of realty duly executed. He afterwards made another will, containing a clause of revocation, of the same land to new trustees but to the same uses. This will was witnessed by three witnesses, who signed out of the presence of the testator. The testator's wife under his direction destroyed the first will. Lord Cowper held that, though the second will was sufficiently attested under section 6 of the Statute of Frauds to be good as a revocation had the clause of revocation stood alone, the written revocation could not be effective when coupled with a devise invalid for want of execution.[27] The Lord Chancellor also resolved, speaking of the act of the testator's wife,

"in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident."

The first resolution will be discussed later. As to the latter, the court determined that it would take jurisdiction of mistake in revocation. This it might well have refused to do. But, having done so, the result is apparently correct. The two wills were so much alike that the testator, had he been informed of the true situation,

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[26] 1 P. Wms. 343, 2 Vern. 741.

[27] In the report in 2 Vern. 742, the Lord Chancellor is quoted as follows: "*that* would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation." The case of Eggleston *v.* Speke, 3 Mod. 258 (1689), had reached the same conclusion where the second will contained no revoking clause. And see *Ex parte* Ilchester, 7 Ves. Jr. 348 (1803). The question could not arise to-day under the Wills Act, 7 WM. IV. & 1 VICT. c. 26, § 20, in England. or under our statutes, which require, unlike STATUTE OF FRAUDS, § 6, that a revoking instrument must be executed in the same manner as a will or a codicil. See THEOBALD, WILLS, 7 ed., 747.

would have preferred the first will to an intestacy. Therefore the court properly refused to allow the revocation to stand.[28]

In general, the later cases on revocation by act under a mistake fall into two classes. First, where the testator tears up his will thinking that he has made a second valid testamentary disposition, but in fact the second disposition is invalid for some reason, such as lack of attestation. Second, where the testator destroys a second will which revoked a prior will, thinking that he thereby revives the first.

Locke v. *James*[29] (1843) is a leading case of the former type. The testator, by will duly witnessed, devised realty to his son in fee charged with the payment of an annuity of six hundred pounds. The testator thereafter erased the word "six" in the gift of the annuity and wrote over it "two." Baron Parke, in holding that the original disposition was not affected, said:

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[28] The case suggests two points of interest. First, equity is here relieving for mistake of law. The leading English case which decided that money paid under mistake of law could not be recovered is Bilbie *v.* Lumley, 2 East, 469 (1802). Lord Ellenborough, C. J., asked the plaintiff's counsel "whether he could state any cause where if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law?" Counsel made no answer, and the court accordingly found for the defendant. Yet Onions *v.* Tyrer (1717) had decided that there could be relief in equity for mistake of law. In Perrott *v.* Perrott, 14 East, 423 (1811), a testatrix made by deed an appointment under a power exercisable by deed or will. She then made a will which she erroneously thought was an effectual appointment. She then cut off the seal of deed and delivered it to a friend to do as she pleased with it, stating that "*it had been a plaguing thing to her; that the purport of it was fully met in her will, and that her will provided for it.*" Lord Ellenborough, not very long after Bilbie *v.* Lumley, decided that whether the mistake be of fact or law it destroyed the *animus revocandi* which could be treated as lacking.

Secondly, there is a line of English cases which hold that where it clearly appears that the destruction of the will is believed by the testator to be the destruction of mere waste paper for the reason that he believes it invalid or revoked there is no *animus revocandi*. In other words, to have effective cancellation the testator must think "I am killing a live thing." Clarkson *v.* Clarkson, 31 L. J. P. (N. S.) 143 (1862); Giles *v.* Warren, L. R. 2 P. & D. 401 (1872); Goods of Thornton, 14 P. D. 82 (1899). And see Beardsley *v.* Lacey, '78 L. T. (N. S.) 25 (1897). In Pennsylvania, however, it has been held that if the will is torn under the belief that it is invalid there is nevertheless a revocation. Emernecker's Estate, 218 Pa. 369, 67 Atl. 701 (1907). Assuming that these English cases are sound, it is by no means clear that Onions *v.* Tyrer falls within this doctrine. It does not appear but that the testator thought his will in full force in spite of the revocation clause in the new will when he directed its destruction, and by revocation by act he may have meant to make assurance doubly sure.

[29] 11 M. & W. 901.

"What the testator in such a case is considered to have intended is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all." . . . "The gift of this legal interest has not been cancelled, for the erasure was made *sine animo cancellandi.*"

Baron Parke seems to consider that mistake prevents intent to revoke; in short, the revocation is, in this class of case, always conditional. But this is contrary to many things in the law; for example, a sale or conveyance induced by fraud or mistake, where it is often conceded that there is an intent to pass title. If we are to probate the original bequest, it should be clear that the deceased would not have revoked except on the supposition that the new act was valid. The inquiry should always be: What would the testator have desired had he been informed of the true situation? And there is no objection to going fully into parol evidence to ascertain his attitude, for one is not varying a writing but an act. It would be interesting to know how Baron Parke would have dealt with a similar substitution of a gift of £1 for a gift of £10,000. Yet this hard and fast rule of *Locke* v. *James* seems to be followed in England,[30] although in some cases [31] the court purports to go into the intent of the testator; and in others[32] the re-

[30] Kirke *v.* Kirke, 4 Russ. 435 (1828); Short *v.* Smith, 4 East, 418 (1803); Sutton *v.* Sutton, Cowp. 812 (1778); Brooke *v.* Kent, 3 Moo. P. C. 334 (1840); Soar *v.* Dolman, 3 Curt. (Eccl.) 121 (1842); Simmons *v.* Rudall, 1 Sim. (N. S.) 115 (1850); Goods of McCabe, L. R. 3 P. & D. 94 (1873); Dancer *v.* Crabb, L. R. 3 P. & D. 98 (1873); Goods of Horsford, L. R. 3. P. & D. 211 (1874); Goods of Greenwood, [1892] P. 7; Estate of Irvin, 25 T. L. R. 41 (1908); Goods of Nelson, L. R. 6 Eq. Ir. 569 (1872); Miller *v.* Miller, 34 CAN. L. J. 743 (1898). See Stamford *v.* White, 84 L. T. R. (N. S.) 269 (1901); Drury's Will, 22 N. B. 318 (1882).

[31] Brooke *v.* Kent, 3 Moo. P. C. 334 (1840); Goods of McCabe, L. R. 3 P. & D. 94 (1873); Stamford *v.* White, 84 L. T. R. (N. S.) 269 (1901); Drury's Will, 22 N. B. 318 (1882).

[32] Goods of McCabe, L. R. 3 P. & D. 94 (1873); Estate of Irvin, 25 T. L. R. 41 (1908). And see Varnon *v.* Varnon, 67 Mo. App. 534 (1896); Gardner *v.* Gardiner, 65 N. H. 230, 19 Atl. 651 (1889). In Goods of Horsford, L. R. 3 P. & D. 211 (1874), a curious and unjustifiable distinction was taken. There some of the amounts of the legacies and names of the legatees were obliterated by pasting over them slips of paper on which new amounts and names were written. The court held that it would infer dependent relative revocation as to the amounts but not as to the names. Accordingly the original will was probated as to the former but not as to the latter. Suppose the court had found underneath the latter slips the name of a near relative of the testator with whom he was on the most cordial terms. Suppose on one of the former "£1" was written, and underneath, "£10,000." For a later litigation over the same will, see Ffinch *v.* Combe, [1894] P. 191.

sult is right, for one may well imagine that the testator would have preferred the first will to an intestacy. In the United States *Locke* v. *James* has been followed in the few cases in which its principle is involved, and seems to be clearly law.[33]

The second type of revocation by act under a mistake is illustrated by *Powell* v. *Powell*.[34] By his first will the testator left all his property to his grandson, and by his second, which contained a revoking clause, he left it all to his nephew. He later expressed his anxiety in regard to the second and tore it up, stating that he wished the earlier document to be his will. The court probated the second will. While the judge talked about the *animus revocandi* having only a conditional existence, and hence being lacking, he also justified the result as based on the clear intent of the testator. Though this is of course the proper inquiry in every case, it is submitted that an incorrect result was reached. There was some evidence of the testator's not caring for his nephew; and so far as the facts appeared the grandson would have profited by an intestacy. Therefore it would seem that the testator would have preferred no will to the second, which he destroyed. The rule of intent finds some support in *Dickinson* v. *Swatman*,[35] and in *Cossey* v. *Cossey*,[36] where the probate of the destroyed will probably more nearly effectuated the wishes of the testator than an intestacy, though this is not entirely clear.

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[33] Wolf *v.* Bollinger, 62 Ill. 368 (1872); *In re* Thompson, 116 Me. 473, 102 Atl. 303, 306 (1917) (*semble*); *In re* Penniman, 20 Minn. 245 (1873); Thomas *v.* Thomas, 76 Minn. 237, 79 N. W. 104 (1899); Jackson *v.* Holloway, 7 Johns. (N. S.) 394 (1811); Varnon *v.* Varnon, 67 Mo. App. 534 (1896); Wilbourn *v.* Shell, 59 Miss. 205 (1881); Pringle *v.* M'Pherson, 2 Brev. (S. C.) 279 (1809); Stover *v.* Kendall, 1 Coldwell (Tenn.) 557 (1860); *In re* Knapen's Will, 75 Vt. 146, 53 Atl. 1003 (1902). But in Smith *v.* Runkle, 97 Atl. (N. J.) 296 (1915), aff'd in 86 N. J. Eq. 257, 98 Atl. 1086 (1916), the judge of the Orphans' Court put the question on the correct basis, that of intention of the testator. In Strong's Appeal, 79 Conn. 123, 63 Atl. 1089 (1906), the testatrix by will exercised a power of appointment to her father for life, to her mother for life, to her sister for life, remainder in fee to her brother. Her father and mother died, her sister's circumstances improved. She said she would exercise the power of appointment for her brother alone. At her death her will was discovered torn lengthwise and at the top of the first page was found written "Superseded by a written one." With this will was an unsigned draft exercising the power of appointment in favor of the brother. If the first will was revoked, the property would go to persons in whom she was not interested. The court held that there was no revocation. The result is clearly sound, but there was of course a revocation, which should have been set aside for mistake.

[34] L. R. 1 P. & D. 209 (1866).

[35] 30 L. J. (P. M. & A.) 84 (1860).

[36] 82 L. T. R. (N. S.) 203, 16 T. L. R. 133, 64 J. P. 89, 69 L. J. P. (N. S.) 17 (1899).

A case somewhat difficult of classification may arise in this fashion:[37] The testator destroys his will, intending the act to be a revocation only when he makes another. He makes a new will thinking it valid; but it is not, for want of attestation. Is this a conditional revocation, or a revocation under a mistake? The answer must be found in the state of mind of the deceased. When a will is destroyed under the impression that there has been a second testamentary disposition, it is clear that the act is a revocation under a mistake. The testator does not say to himself, "This is a revocation *if* the second disposition is valid," for he assumes that it is. He revokes *because* something has happened; a legal transaction has taken place. In the first case supposed, however, it is submitted that the testator says to himself in fact at the time of the act, "This is a revocation if I make a later *valid* will," and not "when I draw up a particular document which I now have photographed on my mind." [38] Therefore, if the second document fails for want of attestation, there is no revocation.

A puzzling case, which oddly has not frequently arisen, may occur when after the testator's death a valid will is found in his possession torn, or indeed not found at all though known to have been executed and in his keeping; and a document purporting to be a later will but invalid for want of proper attestation is discovered among his papers. Here, obviously, a proper classification requires some knowledge of the order of events. If the tearing or destruction came after the second paper, it is a revocation under a mistake; if before, it is either an absolute revocation or a conditional revocation. It is submitted that no presumption as to the order of events can arise, and the revocation must be held effectual.[39] This situation must, however, be sharply distinguished from cases where the will is found with a partial cancellation and an interlineation over such mark.[40] It is fair to assume, in the absence of evidence, that

[37] The facts are suggested by *In re* Thompson, 116 Me. 473, 102 Atl. 303 (1917). Compare cases of failure of executory devise or bequest after the death of the testator. Jackson *v.* Noble, 2 Keen, 590 (1838); Doe *v.* Eyre, 5 C. B. 713 (1848); Robinson *v.* Wood, 27 L. J. Ch. (N. S.) 726 (1858); Hurst *v.* Hurst, 21 Ch. D. 278, 284–286, 290, 293, 294 (1882).

[38] Of course, if clear proof of the actual state of mind of the testator is forthcoming, that should control. The supposition in the text should only be made in the absence of evidence to the contrary.

[39] Drury's Will, 22 N. B. 318 (1882).

[40] See cases in note 33.

both these acts were part of the same transaction. This, then, is a case of revocation by mistake. Furthermore, here the chronological order of the acts is immaterial, provided they were performed on one occasion.

III

Conditional Revocation by Subsequent Instrument

A revocation in writing, as a will in writing, may be conditional on a subsequent event provided the condition is clearly stated in the revoking instrument. This principle is recognized by statute in a few states,[41] and in England and in Pennsylvania.[42] But everywhere, if a condition appears in a will, it will be given effect,[43] and, if the condition is precedent and fails to occur, the will will not be probated.[44] There is no distinction in principle between a conditional will and a conditional revocation. If the condition is precedent and fails to happen, the revocation will not take effect.[45]

IV

Revocation by Subsequent Instrument Under a Mistake

A will cannot be set aside for mistake in either the United States or in England where the testator knew and approved its contents.[46] By the same token a revocation absolute on its face, the words of which the testator knows and approves, will not be set aside because the reasons which induced it are found to be based on false assumptions of fact or law. The testator is dead, and it is too dangerous to inquire what motives induced his action. This

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[41] California, Civil Code, § 1304; Idaho, Rev. Code (1908), § 5741; North Dakota, Comp. Laws (1913), § 5672; Oklahoma, Rev. Laws (1910), § 8369; South Dakota, Comp. Laws (1913), § 1028. Utah, Comp. Laws (1907), § 2758. See Georgia, Annot. Code, § 3920.

[42] Goods of Hugo, L. R. 2 P. D. 73 (1877); Hamilton's Estate, 74 Pa. 69 (1873); Bradish *v.* McClellan, 100 Pa. 607 (1882). The case of Dougherty *v.* Holscheider, 40 Tex. Civ. App. 31, 88 S. W. 1113 (1905), seems erroneous. See Goods of Hugo, L. R. 2 P. D. 73 (1877). Compare Goods of Irvine, 53 Irish Law Times, 144 (1919).

[43] 1 Woerner, Am. Law Adm., 2 ed., § 36; 1 Williams, Executors, 10 ed., 134 *et seq.* But the condition must appear in the will. Sewell *v.* Slingluff, 57 Md. 537 (1881).

[44] Eaton *v.* Brown, 193 U. S. 411, 24 Sup. Ct. Rep. 487 (1903); 1 Williams, Executors, 10 ed., 134–137.

[45] Goods of Hugo, *supra*. But see Dougherty *v.* Holscheider, *supra*.

[46] Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109 (1866); Estate of Benton, 131 Cal. 472, 63 Pac. 775 (1901); 26 Harv. L. Rev. 214.

has to be done for the construction of the document; it should not be resorted to for alteration of it.

But suppose that the ground upon which the testator proceeded appears in the instrument itself. The only parol evidence then necessary to show the error upon which the revocation was based is the non-existence of that fact. May this be shown in the Probate Court to set aside the will of the testator? It has been suggested that under certain circumstances it may. A *dictum* in *Gifford* v. *Dyer*[47] is to the effect that "the mistake must appear on the face of the will, and it must also appear what would have been the will of the testator but for the mistake." It is submitted that jurisdiction in the Probate Court to set aside a will under these facts for mistake is not so objectionable from the point of view of violation of the spirit of the Statute of Wills or the parol evidence rule, as where the ground upon which the testator proceeded must itself be established by extrinsic evidence. But there is no authority for doing this,[48] except in cases of revocation.[49]

This very question has appeared in two types of cases usually classified as dependent relative revocation. The first type originated with *Campbell* v. *French*[50] in 1797. There a codicil contained the following clause: "And as to the legacies or bequests given or bequeathed by my will to my sister, Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they all being dead." The legatees were in fact alive. Lord Loughborough said: "It appears to me there is no revocation, the cause being false." The case was followed on the same facts and on the same principle in 1839 in England.[51] It has recently been affirmed in Ireland,[52] where facts were slightly different but the doctrine the same. By a codicil the testatrix bequeathed certain legacies and directed that they be paid out of "my Victorian Bonds." Later she made another codicil, which began, "I find I have a sum of £700, Victoria 3 per cent stock, which I have not put into my will, and I wish to be disposed of as follows:" Upon its being shown that the

[47] 2 R. I. 99 (1852).

[48] See *In re* Tousey's Will, 34 Misc. 363, 69 N. Y. Supp. 846 (1901).

[49] See *infra*, notes 50–54.

[50] 3 Ves. Jr. 321.

[51] Doe on the demise of Evans *v.* Evans, 10 Ad. & E. 228 (1839).

[52] *In re* Faris, Deceased, [1911] 1 Ir. Ch. 469. See Newton *v.* Newton, 12 Ir. Ch. 118, 128-130 (1861); Barclay *v.* Maskelyne, 4 Jur. (N. S.) 1293 (1858).

bonds and the stock were identical the court held that the second codicil was conditional, and the earlier codicil was not revoked. On the other hand, in a case[53] involving rather unusual facts Mr. Justice Neville disapproved *Campbell* v. *French*, but cannot be said to have overruled it. In the United States one may venture to guess from the scanty authority that *Campbell* v. *French* would be followed on similar facts.[54] Yet three cases at least agree that, if, in spite of the erroneous assumption upon which the testator has expressly based his revocation, he must have known that assumption to be false because it was peculiarly within his knowledge, the revocation stands.[55]

Should *Campbell* v. *French* be supported? It is clear that it cannot be unreservedly. The proper analysis is not that of conditional revocation, but of revocation under a mistake. The testator has not revoked "*if* they are all dead"; but "they being all dead," which is equivalent to "*because* they are all dead." This sort of revocation should be approached from the same point of view as the case of the revocation by act to the document through error. Decline to tamper with the revocation at all, if you please; but if you do tamper with it, set it aside only if that would meet the probable intention of the testator were it possible to call the error to his notice. And on the whole we are inclined to concede this jurisdiction to the Probate Court, provided its field of vision as to the preferences of the testator be confined as narrowly as possible to the testamentary papers. It needs no more proof than is ordinarily required to identify the legatees in any will to show the error of the testator where he makes a second will to this effect: "Since my son is dead, I revoke my devise to him and leave my property to Harvard College." In most cases the setting aside of the second paper, on proof that the son is still alive, would meet the intent of the testator without exposing the will to the dangers of an excursion into extraneous facts.[56] For such an inquiry should be excluded

[53] *In re* Churchill, [1917] 1 Ch. 206, 210.

[54] Whitlock *v.* Vaun, 38 Ga. 562 (1868); Mordecai *v.* Boylan, 6 Jones Eq. (N. C.) 365 (1863); Gifford *v.* Dyer, *supra*.

[55] Giddings *v.* Giddings, 65 Conn. 149 (1894); Hayes *v.* Hayes, 21 N. J. Eq. 265 (1871); Mendinhall's Appeal, 124 Pa. 387 (1889); as where the testator revokes expressly a legacy because he has sold the subject matter, or provided the legatee with a permanent home.

[56] This case must be sharply distinguished from that of a testator who revokes a devise to a son "because he has gone to China," where the son has in fact gone to

as contrary to the spirit of the Statute of Wills. And therefore, even if it could clearly be shown that prior to the second will the testator had quarreled bitterly with his son and would on no account have left him money even if he had known him to be alive, such evidence should be excluded. In order to give the Probate Court a jurisdiction to achieve the intent of the testator, we must be willing to accept an occasional instance of injustice for the sake of a sound result in a majority of the cases. If, however, such quarrel appeared in the testamentary papers the court may well, the question of intent on the face of the documents being doubtful, decline to exercise its extraordinary jurisdiction. The revocation should then stand.

An early decision of Lord Hardwicke points to a distinction which has been taken if the revocation is expressly founded on advice or belief.[57] The testator made a will by which he gave his real and personal estate to a charity. He made a codicil stating that, being doubtful whether by the late Mortmain Act his devise of realty would be good, and being desirous to confirm it in that case and not otherwise, he gave so much of his estate as could not pass by his will to his nephew. He later made "*another codicil reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make farther provision for better support thereof,*" he gave his personal estate to the charity and his land to his nephew. The devise to the charity was not within the act. Lord Hardwicke refused to set aside the second codicil. He said the testator must have meant to revoke irrespective of the soundness of the advice, for otherwise the second codicil was meaningless, as the first would have accomplished his purpose. And, furthermore, grounding the codicil on *advice* was different from grounding it on *fact*, for the testator might well have wished to settle once for all a question upon which he recognized a doubt. And, again, his personal estate might have increased to a sufficient fund for a charity. The case has been approved by text-writers as making a special case for "advice." The testator is apparently

China but the testator erroneously imagined that his residence there would invalidate the will made in his favor. The exact ground upon which the testator proceeded does not appear on the face of the will. See Skipwith *v.* Cabell, 19 Grat. (Va.) 758 (1870).

[57] Attorney Gen'l *v.* Lloyd, 1 Ves. Sr. 32 (1747).

supposed, in using this word, to be settling a doubtful question, and not to be making the later disposition conditional.[58] *Attorney General* v. *Lloyd* has been approved in three cases.[59] It was doubted and a contrary result reached in *Thomas* v. *Howell*[60] in 1874, where gifts by will of two hundred pounds to twenty charities were followed by a codicil in these words: "Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of the will, will appropriate £4000 more to the established institutions of the country, making it together £8000." Vice Chancellor Malins said that *Attorney General* v. *Lloyd* "was a very peculiar case," and if it "had to be decided now, the decision would be the other way." He refused to double the legacies when the "supposed state of things was an entire mistake." The soundness of dealing with such revocations as based on mistake must depend upon whether the words, "since I am advised," or "since I believe," are to be construed "since I am advised, and since I suppose the advice to be true" or "upon the assumption which I believe to be correct."[61] If these expressions are to be so interpreted, as it is submitted they should be, then Lord Hardwicke's distinction must be considered too refined. It can only be justified on the somewhat strained reason given by him that by using the term "advice" the deceased wished to settle a doubtful question. Of course the result in *Attorney*

[58] POWELL, DEVISES, 548; 1 JARMAN, WILLS, 6 Am. ed., 147; THEOBALD, WILLS, 7 ed., 751.

[59] Newton *v.* Newton, 12 Ir. Ch. 118, 129-130 (1861). Attorney Gen'l *v.* Ward, 3 Ves. Jr. 327 (1797), where the testatrix by codicil gave to A a legacy given by her will to the children of B "as I know not whether any of them are alive and if they are well provided for." The children of B were not allowed to take, though alive. And see Skipwith *v.* Cabell, 10 Grat. (Va.) 758 (1870). Of course if the testator does not state that he is acting on advice the court will not listen to extrinsic evidence that he did so act. Dunham *v.* Averill, 45 Conn. 61 (1877).

During the Civil War a Southern lady revoked by codicil gifts by an earlier instrument to Northerners "in consequence of the state of the country," which words appeared in the codicil. She had been told that if she gave property to Northerners it would be confiscated under the Sequestration Act of the Confederate States. The court cited Attorney Gen'l *v.* Lloyd with approval and refused to meddle with the revocation. The decision is clearly sound, for what there was in the state of the country which induced her to alter the legacies did not appear on the face of the will. Skipwith *v.* Cabell, 10 Grat. (Va.) 758 (1870).

[60] L. R. 18 Eq. 198.

[61] 1 JARMAN, WILLS, 6 Am. ed., *147, note k. See *In re* Prevost's Estate, 107 Atl. (Pa.) 388 (1919).

General v. *Lloyd* may well stand on the other reasons given by the court.

The second type of case of revocation by writing executed under a mistake has arisen more frequently than the first. In its simple form it is illustrated as follows: The testator devises his property to A by will. By a second instrument he revokes the first will and leaves the property to a devisee, for instance a corporation, which is incapacitated by law from taking. As soon as the will is proved it is at once clear that the testator has revoked under a mistake; and this indeed is shown without further resort to extrinsic evidence than is required in the proof of any will. Now it has been said that the doctrine of dependent relative revocation does not apply if the second disposition fails, not from the infirmity of the instrument but from want of capacity of the beneficiary to take.[62] This statement, which is admitted by those making it to be difficult to support,[63] is probably due to an attempt to reconcile *Onions* v. *Tyrer* [64] with *French's Case*, the complete report of which is:

"If a man devise land to one, and then devises to the poor of a parish which is void because they do not have capacity to take, yet this is a revocation." [65]

It must be observed that there is no express clause of revocation in this second will, and so the question is presented whether you can say that the intent, which is duly signed and witnessed, to do away with the earlier devise persists in spite of the invalidity of the new disposition to transfer property. Does the revocation depend upon a duly executed declaration of intent, or upon the annulling force of a valid testamentary disposition? One naturally turns to

[62] 1 WILLIAMS, EXECUTORS, 10 ed., 113. See Tupper *v.* Tupper, 1 K. & J. 665 (1855).

[63] See authorities in preceding note; and also THEOBALD, WILLS, 7 ed., 746, 747.

[64] 2 Vern. 742, 1 P. Wms. 343 (1716).

[65] ROLL. ABR., Devise (O) 4. This case was followed in Roper *v.* Radcliffe, 10 Mod. 230; and see Baker *v.* Story, 23 Weekly Rep. 147 (1875). But see *In re* Fleetwood, L. R. 15 Ch. D. 594, 609 (1880). Compare *Ex parte* Ilchester, 7 Ves. Jr. 348 (1803); Pillary *v.* Subammal, 32 T. L. R. 118 (1915); 1 POWELL, DEVISES, 3 ed., by JARMAN, 594, note. The weight of authority in the United States is to the contrary. U. S. Fidelity Co. *v.* Douglas, 134 Ky. 374, 120 S. W. 328 (1909); Lougee *v.* Wilkie, 209 Mass. 184, 95 N. E. 221 (1911); Austin *v.* Oakes, 117 N. Y. 577, 23 N. E. 193 (1890). Compare Estate of Marx, 174 Cal. 762, 164 Pac. 640 (1917). *Contra*, Hairston *v.* Hairston, 30 Miss. 276 (1855) (*semble*); Teacle's Estate, 153 Pa. 219, 25 Atl. 1135 (1893) (*semble*); Carpenter *v.* Miller, 3 W. Va. 174 (1869).

the form of the Statutes of Wills.[66] Under the Statute of Frauds, Wills Act, Illinois and New York statutes, it may well be said that the second instrument "declares" the revocation or "declares the intention to revoke" even though it fails to dispose of property. And it is submitted that the same result, though not so obviously, should be reached in Massachusetts.[67] This suggested result, however, should be subject to the principles of relief for mistake indicated below. Now in *Onions* v. *Tyrer* there was a will validly executed to pass real estate. The testator, to change his trustees, made another will, by which he revoked all former wills and devised the realty to new trustees, but to the same uses. The second will was sufficiently executed so far as the revocation clause was concerned but not as to the dispositions.[68] The case was a peculiar one, which cannot, under modern statutes of wills, occur at the present day.[69] The third resolution dealt with the element of revocation by act, which was a factor in the case.[70] The first resolution held that as the execution was not valid for a will, it could not be valid as to the revocation clause. It is odd that the revocation clause, though validly witnessed, should be held inoperative. The court did not place the ineffectiveness of this clause on the ground of relief for accident, as it did in the third resolution. Had the court done so, its conclusion might be justified upon principles about to be considered. This part of the case, then, must be deemed a peculiar bit of construction of a peculiar provision of

[66] "By some other will or codicil in writing, or other writing declaring the same." STAT. 29 Car. II, c. 3, VI (1676). "By another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed." STAT. 7 Wm. IV. & 1. Vict., c. 26, § XX (1837); KENTUCKY STAT., § 4833 (1915). "By some other will, testament or codicil in writing, declaring the same," etc. ILLINOIS, ANNOT. STAT. (1913), Par. 11558, c. 148, § 17. "By some other writing signed, attested and subscribed in the same manner as a will." MASSACHUSETTS REV. LAWS (1902), c. 135, § 8. "By some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed." NEW YORK CONSOL. LAWS (1909), Decedent Estate Law, § 34.

[67] But see Lougee *v.* Wilkie, 209 Mass. 184, 95 N. E. 221 (1911); Austin *v.* Oakes, 117 N. Y. 577, 23 N. E. 193 (1890).

[68] See STAT. 29 Car. II, c. 3, VI. Compare Barksdale *v.* Barksdale, 12 Leigh (Va.) 535 (1842).

[69] But compare a recent case of a soldier's will, Goodman *v.* Goodman, [1919] P. 229.

[70] See p. 343, *supra*.

the Statute of Frauds in regard to revocation. It is due, then, to an attempt to reconcile *French's Case* with this first resolution, which is of special application only, that we find the books taking a distinction between the second disposition failing for lack of execution, and failing for incapacity of the devisee.

Indeed the English cases do not bear out the distinction. In *Tupper* v. *Tupper* (1855)[71] the testator after a profession of religious faith left property to charities. He later by codicil expressly revoked these gifts and left in lieu thereof a legacy to a charity which was invalid. The court indicated that whether there was a revocation or not depended on intent, yet it was not sure but that the testator intended to revoke in any event. The revocation accordingly remained in force. In *Quinn* v. *Butler* (1868)[72] there was by a first will a valid exercise of a power of appointment given to the testator, who later by will expressly revoked the earlier exercise and made a second, which was void as an improper exercise of a non-exclusive power. The court allowed the revocation to stand, because, although the question depended on the intent of the testator, it was not clear that he would not have preferred the revocation to stand. It would seem, indeed, from the recent decision in *Bernard's Settlement* (1916)[73] that this line of cases is merely another example of the principle of revocation under a mistake. A woman exercised a power of appointment in favor of her children and issue by appointing to her six daughters equally. By a third codicil, which expressly revoked the absolute interest so given to one of the daughters, she dealt with that child's share, though in its favor, in such a way as to violate the rule against perpetuities. The court said, "Did the testator intend by the second appointment to revoke in any case the prior appointment, or did he really only intend to revoke it for the purpose of carrying out the alteration made in his second appointment and without having any intention of revoking the previous gift except for the purpose of the altered appointment?" The court found it reasonably clear that the testatrix would have preferred the first appointment to none for that daughter, and set aside the revocation. This attitude is the proper method of approach. As soon as the will is proved,

[71] 1 K. & J. 665.

[72] L. R. 6 Eq. 225.

[73] [1916] 1 Ch. 552. See also Goodman *v.* Goodman, [1919] P. 229.

it is evident, without any resort to parol evidence, that the testator has labored under a mistake. It is wrong to call it a conditional revocation. He has not revoked "provided," he has revoked absolutely, but has been induced to do so by a misapprehension. That the mistake is one of law is immaterial.[74] The Probate Court should either decline to meddle with the situation or, as it has done in England, take jurisdiction to set aside the revocation, provided it is reasonable to believe from the face of the documents that the probable desires of the testator would be thus achieved. And it should be immaterial whether the second document contains or does not contain a clause of revocation. In a situation, then, as is presented by *French's Case*, the result of the American cases[75] may sometimes be reached by the method of relief for mistake.

The actual results in *Quinn* v. *Butler* and *Bernard's Settlement* are right. The decision in *Tupper* v. *Tupper* is more doubtful. So religious a priest as the testator might well have preferred the charities of the first will as objects of his bounty than next of kin. The guiding principle, however, should be: let the revocation stand unless it is reasonably clear without resort to extrinsic evidence that the deceased would have preferred the first will to an intestacy.

In *Laughton* v. *Atkins* (1823),[76] a case not directly involving revocation under a mistake, the court nevertheless said:

"A second will, inconsistent with the first, perfect in its form and execution, but incapable of operating as a will on account of some circumstance *dehors* the instrument, may nevertheless be set up as a revocation of the first."

This expression, twenty years later repeated in a Pennsylvania case,[77] became the basis of the two leading American cases, *Hairston* v. *Hairston*[78] (1855), Mississippi, and *Price* v. *Maxwell*[79] (1857), Pennsylvania. In both decisions the second document contained an express clause of revocation and a new provision, which failed because of a rule of law. In both the court allowed the revocation

[74] See *supra*, note 28.
[75] See *supra*, note 65.
[76] 1 Pick. (Mass.) 535, 545.
[77] Jones *v.* Murphy, 8 W. & S. (Pa.) 275, 300 (1844); See 1 LOMAX, 52.
[78] 30 Miss. 276.
[79] 28 Penn. 23.

to stand, as the will failed only because of matter *dehors* the instrument. This in *Price* v. *Maxwell* at least seems to have resulted in defeating the testator's desires. Each case has been approved in its own state,[80] and by some other authorities.[81] On the other hand, *Rice County* v. *Scott* [82] (Minnesota) and *Security Co.* v. *Snow* [83] (Connecticut) place the whole question on the intent of the testator, and both cases reach a correct result. The language in the Minnesota case leaves something to be desired. The opinion uses the terms "implied condition" and "unconditional," whereas it must be kept steadily in mind that the situation is one of mistake.

If these observations have not clarified a small corner of the law of wills, may they at least show that once again the panacea of a sonorous phrase or a foreign word [84] has tended only to obscure the common law, and to confuse judges, text writers, and at least one professor of law.

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[80] Vining *v.* Hall, 40 Miss. 83, 107 (1866); Jones *v.* Murphy, 8 W. & S. (Pa.) 275, 300 (1844); Teacle's Estate, 153 Pa. 219, 25 Atl. 1135 (1893); Melville's Estate, 245 Pa. 318, 91 Atl. 679 (1914). But see Rudy *v.* Ulrich, 69 Pa. 177 (1871).

[81] Dudley *v.* Gates, 124 Mich. 440, 83 N. W. 97 (1900); Gossett *v.* Weatherly, 5 Jones Eq. (N. C.) 46, 53 (1859) (*semble*); PAGE, WILLS, § 277. 1 REDFIELD, WILLS, 3 ed., 364. See Barksdale *v.* Hopkins, 23 Ga. 332, 343 (1857).

[82] 88 Minn. 386, 93 N. W. 109 (1903).

[83] 70 Conn. 288, 39 Atl. 153 (1898). But see Blakeman *v.* Sears, 74 Conn. 516, 51 Atl. 517 (1902).

[84] *Dehors.* Compare Bacon's Maxim 25 (sometimes 23), "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur;*" and Prof. J. B. Thayer's comment thereon, ". . . there seemed to be a complete pocket precept covering the whole subject. When this was found clothed in Latin, and fathered upon Lord Bacon, it might well seem to such as did not think carefully that here was something to be depended upon. The maximum caught the fancy of the profession, and figured as the chief commonplace of the subject for many years. . . . it still performs a great and confusing function in our legal discussions." THAYER, PRELIM. TREATISE ON EVIDENCE, 472.